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IN THE

Supreme Court of the United States

DAVID KING, ET AL.,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF MEMBERS OF CONGRESS AND STATE LEGISLATURES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Cases

Halbig v. Burwell,
758 F.3d 390 (D.C. Cir. 2014), *vacated*,
No. 14-5018, 2014 WL 4627181 (D.C. Cir.
Sept. 4, 2014) 15

Halbig v. Sebelius,
27 F. Supp. 3d 1 (D.D.C 2014) 9

Hodel v. Va. Surface Mining & Reclamation Ass'n,
452 U.S. 264 (1981) 22

NFIB v. Sebelius,
132 S. Ct. 2566 (2012) 11

United States v. Bd. of Comm'rs of Sheffield, Ala.,
435 U.S. 110 (1978) 20

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001) 9

Statutes and Regulations

26 U.S.C. § 36B(b)(2)(A) 6

42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) 10

42 U.S.C. § 18031(b)(1) 6

42 U.S.C. § 18041(c)(1) 6

42 U.S.C. §§ 18081-18082 6

TABLE OF AUTHORITIES – cont'd.

Page(s)

42 U.S.C. § 18091(2)(D) 2, 6

76 Fed. Reg. 41,866 (July 15, 2011) 20

75 Fed. Reg. 45,584 (Aug. 3, 2010) 25

Pub. L. No. 112-56, § 401, 125 Stat. 711 (2011) 20

Legislative Materials

155 Cong. Rec. S11,964 (Nov. 21, 2009) 13

155 Cong. Rec. S12,543 (Dec. 6, 2009) 10

155 Cong. Rec. S12,764 (Dec. 9, 2009) 13

155 Cong. Rec. S12,779 (Dec. 9, 2009) 13

155 Cong. Rec. S13,375 (Dec. 17, 2009)) 13

156 Cong. Rec. H2207 (Mar. 22, 2010) 10

H. Comms. on Ways and Means, Energy and Commerce, and Educ. and Labor, *Health Insurance Reform at a Glance: The Health Insurance Exchanges* (2010), *available at* http://housedocs.house.gov/energycommerce/EXCHANGE.pdf 11, 12

House Committee on the Budget Holds a Markup on the Reconciliation Act of 2010, 111th Cong. (2010), 2010 WL 941012 14

TABLE OF AUTHORITIES – cont'd.

Page(s)

H.R. Rep. No. 112-254 (2011), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt254/pdf/CRPT-112hrpt254.pdf 21

S. 1796, 111th Cong. § 1205(a) (2009) 18

Staff of Joint Comm. on Taxation, JCX-18-10, *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010"* (2010), *available at* https://www.jct.gov/publications.html?func=select&id=48 12

Books, Articles, and Other Authorities

Brief of State Petitioners on Medicaid, *Florida v. U.S. Dep't of Health and Human Servs.*, No. 11-400 (11th Cir. Jan. 10, 2012), 2012 WL 105551 27

Cal. HHS, *Public Comments to HHS on the Planning and Establishment of State-Level Exchanges* (Oct. 4, 2010), *available at* https://www.statereforum.org/sites/default/files/california-1.pdf..... 25

Catherine Rampell, *Mr. Health Care Mandate*, N.Y. Times, Mar. 29, 2012..... 19

Christine Monahan, Halbig v. Sebelius *and State Motivations To Opt for Federally Run Exchanges*, CHIRblog (Feb. 11, 2014), http://chirblog.org/halbig-v-sebelius-and-state-motivations-to-opt-for-federally-run-exchanges/ 26

TABLE OF AUTHORITIES – cont'd.

Page(s)

David D. Kirkpatrick, *Health Lobby Takes Fight to the States*, N.Y. Times, Dec. 28, 2009, http://www.nytimes.com/2009/12/29/health/policy/29lobby.html?_r=0 11

David Merritt, *Why States Should Move Forward With Health Insurance Exchanges*, Daily Caller (Mar. 13, 2012), dailycaller.com/2012/03/13/why-states-should-move-forward-with-health-care-exchanges/#ixzz2mjT2jiZe 23

Democratic Policy & Commc'ns Ctr., *Passage of Affordable Care Act Was Open and Transparent. After Passage of the Law, Proof That ACA Works* (Dec. 9, 2014), http://www.dpcc.senate.gov/?p=issue&id=328 10

Eric Whitney, *Despite Setbacks, Bipartisan Support Remains For Colorado Exchange*, npr.org (Mar. 18, 2014), http://www.npr.org/blogs/health/2014/03/18/290092059/despite-setbacks-bipartisan-support-remains-for-colorado-exchange 22

Erin Toner, *Scott Walker's Medicaid Maneuver*, Kaiser Health News (Nov. 19, 2013), http://kaiserhealthnews.org/news/wisconsin-governor-scott-walker-embraces-parts-of-obamacare/ 30

TABLE OF AUTHORITIES – cont'd.

Page(s)

Families USA *Amicus* Brief, *Halbig v. Sebelius*, No. 13-cv-00623-PLF (D.D.C. Nov. 12, 2013), ECF No. 48-1 20

Governor Walker Addresses WMC Business Day in Madison, WI, Wisconsin Eye (Feb. 13, 2013), http://www.wiseye.org/videoplayer/vp.html?sid=9595..... 30

Jonathan H. Adler & Michael F. Cannon, *Another ObamaCare Glitch*, Wall St. J., Nov. 16, 2011, http://www.wsj.com/articles/SB10001424052970203687504577006322431330662..... 28

Letter from CBO Director Douglas W. Elmendorf to Rep. Darrell E. Issa (Dec. 6, 2012), http://www.cbo.gov/sites/default/files/43752-letterToChairmanIssa.pdf 15

Letter from Lloyd Doggett et al. to President Barack Obama (Jan. 11, 2010), *available at* http://www.myharlingennews.com/?p=6426..... 11

Letter from Senator E. Benjamin Nelson to Senator Robert P. Casey, Jr. (Jan. 27, 2015), http://theusconstitution.org/sites/default/files/briefs/Senator_Casey_re_King_v_Burwell-27_JAN_2015.pdf 17,18

TABLE OF AUTHORITIES – cont'd.

Page(s)

Letter from Senator Robert P. Casey, Jr., to Senator E. Benjamin Nelson (Jan. 27, 2015), http://theusconstitution.org/sites/default/files/briefs/150127_Letter_to_Senator_Nelson_re_King_v_Burwell.pdf. 18

Nat'l Governors Ass'n, *Implementation Timeline for Federal Health Reform Legislation* (2010), *available at* http://www.nga.org/files/live/sites/NGA/files/pdf/1003HEALTHSUMMITIMPLEMENTATIONTIMELINE.PDF 27

Nat'l Governors Ass'n, *State Perspectives on Insurance Exchanges: Implementing Health Reform In An Uncertain Environment* (2011), *available at* http://www.nga.org/files/live/sites/NGA/files/pdf/1109NGAEXCHANGESSUMMARY.PDF 27

Ohio Health Care Coverage & Quality Council, Report of Health Benefits Exchange Task Force, *available at* https://www.statereforum.org/sites/default/files/hbe_pros_cons_10_2_10_-_final_2.pdf 26

Philip Rucker, *Sen. DeMint of S.C. Is Voice of Opposition to Health Care Reform*, Wash. Post, July 28, 2009, http://articles.washingtonpost.com/2009-07-28/politics/36871540_1_health-care-reform-health-care-fight-health-care 11

TABLE OF AUTHORITIES – cont'd.

Page(s)

President Barack Obama Holds a Townhall Event, Nashua, New Hampshire, Roll Call (Feb. 2, 2010), 2010 WL 358122 13

Rep. Joe Sestak, News Release, *Rep. Sestak Votes for Final Passage of Historic Health Care Reform Legislation* (Mar. 23, 2010), 2010 WLNR 6031395 13

Sen. Mark Pryor, Press Release, *On Senate Passage of Health Care Reform* (Dec. 24, 2009), 2009 WLNR 26018100 13

Sen. Mary Landrieu, *Breaking: Landrieu Supports Passage of Historic Senate Health Care Bill* (Dec. 22, 2009), 2009 WLNR 25819782 13

Sen. Russell Feingold, *Sen. Feingold Issues Statement on Health Care, Education Affordability Reconciliation Act of 2010* (Mar. 25, 2010), 2010 WLNR 6142152 13

Steve Mistler, *Outspoken Critic of Obamacare Helped To Turn LePage Against State Exchange*, Portland Press Herald, Nov. 23, 2014, http://www.pressherald.com/2014/11/23/outspoken-critic-of-obamacare-helped-to-turn-lepage-against-state-exchange/ 28

TABLE OF AUTHORITIES – cont'd.

Page(s)

Tex. Dep't of Ins. & HHS Comm'n, *Public Comments to HHS on the Planning and Establishment of State-Level Exchanges* (Oct. 4, 2010), *available at* https://www.statereforum.org/sites/default/files/texas.pdf 26

Theda Skocpol, *Why Congressional Budget Office Reports Are the Best Evidence of Congressional Intent About Health Subsidies*, Scholars Strategy Network (Jan. 2015), http://www.scholarsstrategynetwork.org/content/why-congressional-budget-office-reports-are-best-evidence-congressional-intent-about-health- 15

Timothy S. Jost, *Health Insurance Exchanges: Legal Issues*, O'Neill Inst. at Geo. U. Legal Ctr. (2009), *available at* http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1022&context=ois_papers..... 16

Vaughn Hillyard, *Politics Wasn't Only Reason Why Some GOP-Led States Didn't Set Up Own Exchanges*, NBC News (Dec. 4, 2013), http://www.nbcnews.com/politics/first-read/politics-wasnt-only-reason-why-some-gop-led-states-didnt-v21755208 22

TABLE OF AUTHORITIES – cont'd.

Page(s)

Written Testimony of Professor Jonathan Gruber before the Comm. on Oversight and Gov't Reform, U.S. House of Representatives (Dec. 9, 2014), http://oversight.house.gov/wp-content/uploads/2014/12/Gruber-Statement-12-9-ObamaCare1.pdf 19

WSJ Live Presents: Gov. Scott Walker Interviewed, Wall St. J. Video (Mar. 27, 2013), http://www.wsj.com/video/wsj-live-presents-gov-scott-walker-interviewed/1BC163BF-68C2-4351-9DFF-CCF03AE5FC6E.html 30

INTEREST OF *AMICI CURIAE*[1]

Amici are members of Congress who are current and former leaders of the committees that crafted the ACA and the House and Senate leaders who melded the respective committee versions into the bill that was ultimately enacted. *Amici* also include members of state legislatures who served during the period when their governments were deciding whether to create their own Exchanges under the ACA.[2] Based on their experiences, *amici* are familiar with the statute and with the debates that took place in Congress regarding enactment of the statute and in state legislatures regarding its implementation.

Amici have an interest in ensuring that the ACA is construed by the courts in accord with its text and purpose. In that regard, *amici* submit this brief to address Petitioners' assertion that the tax credits at issue in this case were intended to encourage States to set up their own health benefit Exchanges under penalty of withdrawal of crucial tax credits and subsidies for lower-income residents. As *amici* know from their own experiences, Petitioners' assertion is inconsistent with the text and history of the statute. It is also inconsistent with its most fundamental pur-

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

[2] *Amici* who no longer serve in Congress or a state legislature join solely in their individual capacities as former members of Congress and state legislatures.

pose to make health insurance affordable for all Americans by providing tax credits for low and middle-income individuals, wherever they reside, and with the ACA's interdependent statutory scheme, which critically depends on the availability of these tax credits for low and middle-income individuals who purchase insurance on the new American Health Benefit Exchanges ("Exchanges") created by the Act. *Amici* well understand, as they well understood when the legislation was under consideration in Congress and state capitals, that, without premium assistance tax credits and subsidies, the Exchanges themselves would be rendered inoperable, and, indeed, the effectiveness of other major components of the law, such as guarantees of affordable insurance for people with pre-existing health conditions and the "individual mandate" to carry insurance or pay a penalty, could be gravely jeopardized.

A full listing of congressional *amici* appears in Appendix A, and a full listing of state legislator *amici* appears in Appendix B.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2010, Congress enacted the Patient Protection and Affordable Care Act ("ACA"), a landmark law dedicated to achieving affordable "near-universal coverage," 42 U.S.C. § 18091(2)(D). Toward that end, the ACA provides that individuals can purchase competitively-priced health insurance policies on American Health Benefit Exchanges ("Exchanges"), and it authorizes federal tax credits and subsidies for low and middle-income individuals who purchase insurance on the Exchanges. *Amici* are members of Congress who served while the ACA was being passed and members of state legislatures who served while

their state governments were deciding whether to create their own Exchanges. *Amici* know from personal experience that the ACA's core purpose is to achieve universal health care coverage, that Exchanges are critical to achieving that goal, and that the provision of tax credits and subsidies to low- and middle-income Americans is indispensable to the effective functioning of the ACA.

Petitioners seek to invalidate the Internal Revenue Service regulation confirming that the ACA's premium tax credits are available to all qualifying individuals, regardless of whether they purchase insurance on a state-run or federally-facilitated Exchange, on the ground that the statute authorizes tax credits only for individuals who purchase insurance on Exchanges "established by the State." In other words, according to Petitioners, individuals who would otherwise qualify for the tax credits should be denied that benefit if they purchase insurance on a federally-facilitated Exchange.

Because the textual basis for this argument is so weak (Petitioners isolate a four-word phrase contained in two subclauses rather than considering the text of the statute as a whole), they impute to Congress—in effect, to congressional *amici* themselves—the purpose of deliberately prescribing tax credits only on state-run Exchanges, as a means of encouraging States to set up their own Exchanges. This objective, they claim, was so important that Congress drafted the ACA in a way that would guarantee the collapse of non-state-run Exchanges, even though that would drastically curb, rather than broaden, access to health insurance. *Amici* submit this brief to demonstrate that the purpose attributed to the statute by Petitioners was, in fact, never contemplated by the legislators who enacted the law, nor by the state offi-

cials charged with deciding whether to establish their own Exchanges.

The text, purpose, and history of the statute all support *amici*'s position. To start, the provision prescribing the credits explicitly makes them available to all "applicable taxpayers," and defines "applicable taxpayers" based on income, not State of residence. Petitioners rely on one four word phrase in two subclauses setting out the formula for calculating the amount of the tax credit to argue that tax credits should not be available in States with federally-facilitated Exchanges. Even in isolation, the language on which Petitioners rely provides, at best, ambiguous support for their interpretation, but read in the context of the remainder of the provision, not to mention the statute as a whole, it is clear that the provisions at issue plainly prescribe tax credits and subsidies for participants in all Exchanges, federally-facilitated and state-run.

In any event, based on our collective experience in Congress, congressional *amici* know that it would make no sense to hide such an important condition in such an obscure subsection if our intent, as Petitioners claim, was to make clear to state legislators that premium assistance credits and subsidies would be unavailable if their State failed to set up its own Exchange. Indeed, congressional *amici* know from their experience drafting and enacting this legislation that Congress imposed no such condition. The purpose of the tax credit provision was to facilitate access to affordable insurance through all Exchanges, state-run or federally-facilitated, and to ensure that all Exchanges could work with other fundamental components of the law in order to provide universal access to insurance. It was not, as Petitioners would have it, to incentivize the establishment of state Exchanges

above all else, and certainly not to thwart the overall statutory scheme and Congress's fundamental purpose of making insurance affordable for all Americans.

Just as *amici* members of Congress never sent States the message that they needed to set up their own Exchanges for their citizens to qualify for the tax credits, *amici* state legislators never understood Congress to be sending that message based on their review of the statute and the legislative record. To the contrary, *amici* state legislators understood that tax credits would be available to their citizens regardless of whether their States set up their own Exchanges. State governments identified numerous implementation issues in the period immediately following the law's enactment, but the possibility that the failure to set up a state-run Exchange would preclude that State's citizens from enjoying the tax credits and subsidies was never one of them. Indeed, some *amici* served in States that declined to set up their own Exchanges; had *amici* thought there was even a possibility that their constituents would lose access to these tax credits unless the State established its own Exchange, they would have vigorously advocated for a state-run Exchange citing this potential consequence.

In sum, as *amici* know from their own experience and as the record reflects, the availability of tax credits under the ACA should not turn on whether an individual purchased insurance on a federal or state Exchange. Rather, such credits should be available to all qualified individuals regardless of where they live. Such a conclusion is the only one consistent with the ACA's text, purpose, and history. Indeed, if the Court were to accept Petitioners' version of the statute, it would render inoperable not only the sys-

tem of Exchanges, but other critical aspects of the law—such as the individual mandate and the provisions guaranteeing coverage for people with pre-existing conditions—further evidence that such interpretation is wholly without merit. This Court should affirm the judgment of the court below.

ARGUMENT

The Affordable Care Act's express goal was to make health care insurance available to all Americans. *See, e.g.*, 42 U.S.C. § 18091(2)(D). To achieve that goal, the statute provides for the establishment of Exchanges on which individuals can purchase health insurance. Under the statute, each State may establish its own Exchange, 42 U.S.C. § 18031(b)(1), or if a State chooses not to establish an Exchange, the Secretary of Health and Human Services is directed to establish "such Exchange" in its stead, *id.* § 18041(c)(1). The ACA also creates tax credits for low- and middle-income Americans to ensure that they can afford to purchase insurance on the Exchanges, *see id.* §§ 18081-18082, and it sets out a formula for calculating the amount of the credit, which is partially determined by the "monthly premiums for . . . qualified health plans . . . enrolled in through an Exchange established by the State," 26 U.S.C. § 36B(b)(2)(A).

Petitioners argue that because the provision setting out the formula for calculating the amount of the credit refers to "an Exchange established by the State," the tax credits are available only to individuals who purchase insurance on state-run Exchanges. Pet'rs Br. 3. In other words, such credits are not available to individuals who purchase insurance on a federally-facilitated Exchange. According to Petitioners, the statute was structured this way because its

drafters calculated that the availability of the tax credits would induce States to establish their own Exchanges, and they placed so high a priority on this objective that they structured the Exchange provisions to override—indeed, to empower state officials to disable the Exchanges and thereby thwart—the law's core purpose of promoting universal access to affordable health insurance. *Id.* at 43.

As *amici* can attest, that was never the purpose of the tax credit provisions, which is clear from the debates within Congress over the ACA's enactment and in state capitols over its implementation. Indeed, it was widely understood that the tax credits would be available to all Americans who satisfied the statute's income criteria regardless of where they lived. If, as Petitioners argue, the threat of cutting off access to insurance for upwards of 80% of the individuals expected to gain access through the Exchanges was a "stick" to encourage state officials to establish state Exchanges, Congress surely would have communicated to the States that the availability of the tax credit turned on the establishment of a state Exchange, and the States would have understood that message. Neither event happened.

I. CONGRESS NEVER INTENDED—OR SUGGESTED TO THE STATES—THAT TAX CREDITS WOULD ONLY BE AVAILABLE TO INDIVIDUALS WHO PURCHASED INSURANCE ON STATE-RUN EXCHANGES

Amici members of Congress chaired the committees that crafted the ACA and led the two chambers as the respective committee versions were melded into the bill that was ultimately enacted, or they were otherwise actively involved in the debate concerning the ACA. They know from that experience that the tax credits are indispensable to the statute's goal of af-

fordable health insurance for *all* Americans and Congress accordingly prescribed such credits for *all* Americans, regardless of whether they purchased their health insurance on a state-run or federally-facilitated Exchange. Petitioners' contrary conjecture, that the tax credits were primarily a tool to encourage States to establish Exchanges (Pet'rs Br. 2-3), is simply false, as the text and history of the statute make clear.[3] In fact, during the debates over the ACA in Congress, no one suggested, let alone explicitly stated, that a State's citizens would lose access to the tax credits if the State failed to establish its own Exchange. Petitioners do not—and cannot—explain how the tax credits could have encouraged States to establish Exchanges if state officials were never told that availability of the credits turned on whether or not a State created its own Exchange.[4]

The text of the statute makes clear that the state establishment of an Exchange was never viewed as a condition for the availability of tax credits. Indeed, as one court has noted, "[o]ne would expect that if Congress had intended to condition availability of the tax credits on state participation in the Exchange regime, this condition would be laid out clearly in . .

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[3] Significantly, even as Petitioners' argument critically depends on the idea that the tax credits were a tool to encourage States to establish Exchanges, multiple States supporting Petitioners have suggested just the opposite, *i.e.*, that States deliberately chose not to set up Exchanges to avoid receipt of the tax credits. *See* Oklahoma et al. *Amici* Br. 2, 16; Indiana & 39 Ind. Pub. Sch. Corps. *Amici* Br. 2.

[4] Instead of focusing on the tax credit provision, Petitioners point to *other* provisions as evidence that Congress uses "carrots" and "sticks" to encourage state action. *See, e.g.*, Pet'rs Br. 32. No one disputes that Congress *can* use such tools; the question is whether Congress did so here. Congress did not.

the provision authorizing the credit." *Halbig v. Sebelius*, 27 F. Supp. 3d 1, 23 n.12 (D.D.C. 2014). Yet Petitioners point to nothing in that provision that would have indicated to States that their citizens would lose access to the tax credits if the State failed to set up its own Exchange. Instead, Petitioners point only to language in the technical formula for calculating the amount of the credit that the subsidy provision expressly makes available to "applicable taxpayer[s]," regardless of State of residence. And even that language does not suggest, let alone state unambiguously, that the failure to set up a state-run Exchange would result in loss of the tax credit. Drawing the connection between the tax credits and the Exchanges so obliquely—especially in the context of other language in Section 36B(a) expressly making the credit available to *all* applicable taxpayers, regardless of where they live—would hardly have made sense if, as Petitioners argue, the purpose of the tax credit was to induce States to establish their own Exchanges. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("[Congress] does not . hide elephants in mouseholes.").[5]

Nor did members of Congress say anything during the extensive debates about the bill to suggest that States would need to set up their own Exchanges if they wanted their citizens to have access to the tax credits. Indeed, the ACA was the subject of a historic amount of study and debate in both houses of Con-

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[5] Moreover, as the Government notes, "[h]ad Congress intended to impose that consequence, it would surely have spelled that out in [the section] which sets forth States' options for establishing Exchanges . . . so that States could evaluate the implications of their choice." Resp'ts Br. 24. Yet Congress did not.

gress,[6] and if, as Petitioners argue, members of Congress had intended to use the tax credits to encourage States to set up their own Exchanges, surely someone at some point would have suggested as much,[7] especially since, contrary to Petitioners' claim otherwise (Pet'rs Br. 43), there was widespread awareness that many States might *not* set up their own Exchanges, *see, e.g.*, 156 Cong. Rec. H2207 (Mar. 22, 2010) (statement of Rep. Michael Burgess); 155 Cong. Rec. S12,543 (Dec. 6, 2009) (statement of Sen. Tom Co-

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[6] For example, the Senate Finance Committee held 53 meetings on health reform, in addition to a seven-day markup of the bill (the longest Finance Committee markup in 22 years), and when the bill came to the floor, the Senate spent 25 consecutive days in session on health reform (the second longest consecutive session in history). Democratic Policy & Commc'ns Ctr., *Passage of Affordable Care Act Was Open and Transparent. After Passage of the Law, Proof That ACA Works* (Dec. 9, 2014), http://www.dpcc.senate.gov/?p=issue&id=328. Similarly, over the course of a year, the House held 79 bipartisan hearings and markups on the bill, spending nearly 100 hours in hearings and hearing from 181 witnesses. *Id.*

[7] Petitioners assert that "nowhere does the legislative history reject . . . Medicaid funds for states that decline to expand eligibility. This reinforces the legal point that such legislative history 'amens' are irrelevant, and the practical point that the ACA's legislative history does not discuss all important issues." Pet'rs Br. 40. But this is an apples and oranges comparison. The ACA Medicaid expansion was simply an incremental modification of a half-century old conditional grant program, the nation's largest. Indeed, all the ACA did was add "individuals . whose income . . . does not exceed 133 percent of the poverty line" to preexisting categories of Medicaid-eligible individuals that States were required to cover to receive Medicaid funding. *See* 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII). The legal effect of this addition thus required no explanation. That in no way explains why Congress would have failed to make clear the conditional availability of new tax credits for individuals as part of a brand-new health exchange arrangement.

burn); *see also NFIB v. Sebelius*, 132 S. Ct. 2566, 2665 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (noting that "Congress thought that some States might decline . . . to participate in the operation of an exchange"); *cf.* Pet'rs Br. 14 (describing the State establishment of an Exchange as a "controversial responsibility").[8] Yet no one did.

In fact, everyone understood that tax credits would be available to purchasers on all of the Exchanges, federal and State. For example, on March 20, 2010, the three House committees with jurisdiction over the ACA issued a summary fact sheet explaining how the Exchanges would operate under the Senate bill as amended by the then-pending reconciliation language. That fact sheet, while recognizing that there would be both state-run and federally-facilitated Exchanges, drew no distinction between them.[9] Specifically, it explained that the Senate bill would "create

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[8] *See also, e.g.*, David D. Kirkpatrick, *Health Lobby Takes Fight to the States*, N.Y. Times, Dec. 28, 2009, http://www.nytimes.com/2009/12/29/health/policy/29lobby.html?_r=0; Philip Rucker, *Sen. DeMint of S.C. Is Voice of Opposition to Health Care Reform*, Wash. Post, July 28, 2009, http://articles.washingtonpost.com/2009-07-28/politics/36871540_1_health-care-reform-health-care-fight-health-care; Letter from Lloyd Doggett et al. to President Barack Obama (Jan. 11, 2010), *available at* http://www.myharlingennews.com/?p=6426. Petitioners' *amici* also point to Congress's failure to "authorize funding for the creation of federal Exchanges" as evidence that Congress assumed all States would set up their own Exchanges. Jonathan H. Adler & Michael F. Cannon *Amici* Br. 34. This is wrong. *See* Resp'ts Br. 42 n.14 (explaining that Congress "provided funding for federally-facilitated Exchanges" (citing HCERA § 1005, 124 Stat. 1029)).

[9] *See* H. Comms. on Ways and Means, Energy and Commerce, and Educ. and Labor, *Health Insurance Reform at a Glance: The Health Insurance Exchanges* 1 (2010), *available at* http://housedocs.house.gov/energycommerce/EXCHANGE.pdf.

state-based health insurance Exchanges, for states that choose to operate their own exchanges, and a multi-state Exchange for the others," and that "[t]he Exchanges"—that is, all of them—would "make health insurance more affordable and accessible for small businesses and individuals."[10] The fact sheet also noted that the ACA "[p]rovides premium tax credits," but did not suggest that they would only be available on state-run Exchanges.[11] To the contrary, the summary stated the only criterion for the tax relief was income level.[12]

Similarly, on March 21, 2010, the Joint Committee on Taxation explained that the statute "creates a refundable tax credit (the 'premium assistance credit') for eligible individuals and families who purchase health insurance through *an exchange*."[13] The summary's explanation that the credit would be available to individuals who purchased health insurance through "*an exchange*" made clear that the tax credits would be available to all qualifying Americans, regardless of whether their State set up its own Exchange.

Senators also consistently indicated that the credits would be available to all individuals who purchased insurance on an Exchange, be it state-run or federally-facilitated. The manager of the ACA, Senator Max Baucus, noted that "[u]nder our bill, new exchanges

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[10] *Id.*

[11] *Id.* at 2.

[12] *Id.*

[13] Staff of Joint Comm. on Taxation, JCX-18-10, *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010"* 12 (2010), *available at* https://www.jct.gov/publications.html?func=select&id=48 (emphasis added).

will provide one-stop shops where plans are presented . . And tax credits will help to ensure all Americans can afford quality health insurance." 155 Cong. Rec. S11,964 (Nov. 21, 2009).[14] Likewise, Senator Dick Durbin, the Senate Majority Whip, described the availability of the tax credit in broad terms that made clear the only qualifying criterion was income level. According to Senator Durbin, "[t]his bill says, if you are making less than $80,000 a year, we will give you tax breaks to pay [health insurance] premiums." *Id.* S12,779 (Dec. 9, 2009).[15] President Obama, too, indicated that the only criterion for qualifying for the tax credits would be income.[16]

Significantly, even ACA opponents in Congress recognized that that the only criterion that determined eligibility for the tax credits would be income. Congressman Paul Ryan, for example, asserted on March

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[14] Senator Baucus also subsequently noted that "[a]bout 60 percent of those who are getting insurance in the individual market on the exchange will get tax credits," 155 Cong. Rec. S12,764 (Dec. 9, 2009), an estimate that could only be accurate if tax credits were available in *all* States.

[15] Many Senators noted that the tax credits would be broadly available to help low- and middle-income Americans afford health insurance regardless of where they lived. *See, e.g.*, 155 Cong. Rec. S13,375 (Dec. 17, 2009) (statement of Sen. Tim Johnson); Sen. Mary Landrieu, *Breaking: Landrieu Supports Passage of Historic Senate Health Care Bill* (Dec. 22, 2009), 2009 WLNR 25819782; Sen. Mark Pryor, Press Release, *On Senate Passage of Health Care Reform* (Dec. 24, 2009), 2009 WLNR 26018100; Sen. Russell Feingold, *Sen. Feingold Issues Statement on Health Care, Education Affordability Reconciliation Act of 2010* (Mar. 25, 2010), 2010 WLNR 6142152; *see also* Rep. Joe Sestak, News Release, *Rep. Sestak Votes for Final Passage of Historic Health Care Reform Legislation* (Mar. 23, 2010), 2010 WLNR 6031395.

[16] President Barack Obama Holds a Townhall Event, Nashua, New Hampshire, Roll Call (Feb. 2, 2010), 2010 WL 358122.

15, 2010, that the tax credits were a "new open-ended entitlement that basically says that just about everybody in this country—people making less than $100,000, you know what, if your health care expenses exceed anywhere from 2 to 9.8 percent of your adjusted gross income, don't worry about it, taxpayers got you covered, the government is going to subsidize the rest."[17] Further, Ryan expressly stated that "[f]rom our perspective, these state-based exchanges are very little in difference between the House version—which has a big federal exchange . . . But what we're basically saying to people making less than [400% of the] FPL . . . don't worry about it. Taxpayers got you covered."[18]

Tellingly, in response to member requests from both parties, the Congressional Budget Office performed 68 budgetary impact analyses during the 2009-2010 legislative debate over the ACA, and in each one, it assumed that the tax credit would be available to all individuals who purchased insurance on an Exchange, regardless of whether the Exchange was federally-facilitated or state-run. These CBO analyses were of critical importance because many members of Congress made their vote for the ACA contingent on CBO's conclusion that the ACA was deficit neutral. Yet "no one in either party objected or

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[17] *House Committee on the Budget Holds a Markup on the Reconciliation Act of 2010*, 111th Cong. (2010), 2010 WL 941012 (statement of Rep. Paul Ryan). While Congressman Ryan signed onto an *amici curiae* brief in support of Petitioners in this case, that brief nowhere disputes the universal congressional understanding that tax credits would be available in all States. Tellingly, that brief does not address at all the question of Congress's intent or understanding with respect to the issue in this case.

[18] *Id.*

asked for alternative estimations assuming partial subsidies at any point in the 111th Congress." Theda Skocpol, *Why Congressional Budget Office Reports Are the Best Evidence of Congressional Intent About Health Subsidies*, Scholars Strategy Network (Jan. 2015), http://www.scholarsstrategynetwork.org/content/why-congressional-budget-office-reports-are-best-evidence-congressional-intent-about-health-. Indeed, as the director of the Congressional Budget Office later stated, "[T]he possibility that those subsidies would only be available in states that created their own exchanges did not arise during the discussions CBO staff had with a wide range of Congressional staff when the legislation was being considered." Letter from CBO Director Douglas W. Elmendorf to Rep. Darrell E. Issa (Dec. 6, 2012), http://www.cbo.gov/sites/default/files/43752-letterToChairmanIssa.pdf.

Ignoring all of this evidence, Petitioners argue that "the 'scant legislative history' that exists for the ACA supports the proposition that Congress conditioned subsidies on state creation of Exchanges to induce states to act." Pet'rs Br. 40 (internal citation omitted). Petitioners offer four pieces of alleged evidence to support that proposition. In fact, none do. *See Halbig v. Burwell*, 758 F.3d 390, 425 (D.C. Cir. 2014), *vacated*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014) (Edwards, J., dissenting) ("[Petitioners] have no credible evidence whatsoever to support their subsidies-as-incentive theory."); Pet. App. 71a ("the lack of *any* support in the legislative history of the ACA indicates that [Petitioners' interpretation of section 36B] is not a viable theory" (emphasis added)).

To start, Petitioners assert that "when the Senate began to consider state-based Exchanges, a prominent expert . . . proposed 'tax subsidies for insurance

only in states that complied with federal requirements." Pet'rs Br. 41. But the "proposal" to which they point was an unpublished academic paper, a paper that, critically, is nowhere mentioned in the voluminous record of the ACA debates. Moreover, even if that paper had been considered by the actual legislators who enacted the ACA (which again it was not), it would not support Petitioners' position. The paper actually suggested *multiple* ways in which Congress could encourage state participation in the Exchanges. Specifically, it stated that "Congress could . . . provide a federal fallback program to administer exchanges in states that refused to establish complying exchanges. *Alternatively* it could . . . offer[] tax subsidies for insurance only in states that complied with federal requirements."[19] As *amici* know and the record reflects, Congress chose the former option.

Second, Petitioners claim that "the Senate committees working on ACA legislation took up [the suggestion in that academic paper]." *Id.* But to support this assertion, they cite a provision drafted by only one of the committees involved in drafting the ACA, and the committee that took it up (HELP) was not the committee (Finance) that was the source of the Exchange provisions relevant to this appeal. Thus, the provision is irrelevant to interpreting the Finance Committee-drafted provisions at issue here. Moreover, as Petitioners acknowledge, that provision did not even condition subsidies on State establishment of Exchanges; rather, it provided subsidies to States that adopted "certain 'insurance reform provisions.'" *Id.* It does not help Petitioners to argue that "[t]he Fi-

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[19] Timothy S. Jost, *Health Insurance Exchanges: Legal Issues*, O'Neill Inst. at Geo. U. Legal Ctr., at 7 (2009), *available at* http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1022&context=ois_papers (emphasis added).

nance Committee . . simply conditioned subsidies on state creation of Exchanges, as opposed to their adoption of insurance reforms" (*id.*) because those are entirely different policies. Thus, all the draft HELP provision shows is that Congress knows how to draft conditional grant provisions when it wants to do so. *See* Resp'ts Br. 48 n.18 (noting that the condition in the HELP bill was "set forth in a provision expressly directed to the States—not buried in the formula for the credit available to a particular individual"). It did not do so here.

Third, Petitioners argue that the "House had no choice but to pass the Senate bill" with the provision making tax credits conditional "after ACA supporters lost their filibuster-proof majority when Scott Brown won a special Senate election in January 2010." Pet'rs Br. 42. Congressional opponents of the ACA make a related argument, stating that the language in Section 36B was the result of "lengthy negotiations" that were necessary because the absence of a filibuster-proof majority made "compromise within the Democratic caucus . . necessary" to ensure the bill's passage. Cornyn et al. *Amici* Br. 13, 12. These arguments have no basis in fact: the pertinent text was not part of any "compromise." *See* Letter from Senator E. Benjamin Nelson to Senator Robert P. Casey, Jr., at 2 (Jan. 27, 2015), http://theusconstitution.org/sites/default/files/briefs/Senator_Casey_re_King_v_Burwell-27_JAN_2015.pdf [hereinafter Nelson Letter] (explaining that there was no such compromise because he "*always* believed that tax credits should be available in all 50 states regardless of who built the exchange, and the final law also reflects that belief as well" (emphasis in orig-

inal)).[20] Rather, it was included in the bill reported by the Senate Finance Committee on October 19, 2009, *see* S. 1796, 111th Cong. § 1205(a) (2009), and it was at no point a focus of controversy or even attention. The provision was not amended after ACA supporters lost their filibuster-proof majority because, as previously discussed, no one then interpreted the provision in the way Petitioners now do.[21]

Fourth, Petitioners assert that the "incentive function [of the subsidies provision] was well understood by, among others, Jonathan Gruber," an economist at M.I.T., who they claim was a "leading ACA architect and HHS consultant who helped draft the legislation." Pet'rs Br. 42. In fact, Gruber's role was providing economic modeling and similar technical

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[20] Senator Nelson wrote the cited letter in response to a letter from Senator Casey asking him about Petitioners' assertions that "the [ACA] was intentionally designed to deny tax credits to people in states with federally facilitated exchanges in order to 'induce' the states into operating their own exchanges" and that it "was designed this way because [Senator Nelson] and other unnamed 'centrist Senators' insisted upon this structure." Letter from Senator Robert P. Casey, Jr., to Senator E. Benjamin Nelson (Jan. 27, 2015), http://theusconstitution.org/sites/default/files/briefs/150127_Letter_to_Senator_Nelson_re_King_v_Burwell.pdf. In response to this query, Senator Nelson explained that he "advocated for flexibility to the states to establish state-based exchanges with a federal exchange as a backup," but "[i]n either scenario – a state or federal exchange – our purpose was clear: to provide states the tools necessary to deliver affordable healthcare to their citizens, and clearly the subsidies are a critical component of that effort regardless of which exchange type a state chooses." Nelson Letter 1-2.

[21] Indeed, a national Exchange—with an option for States to form their own exchanges—was a key component of the House bill, and the House would not have allowed the bill to survive had it understood the Senate version to eliminate tax credits on federally-facilitated Exchanges.

information and analysis; he was certainly not a "leading ACA architect," and in no way a drafter of the legislation, as Gruber himself has acknowledged. Written Testimony of Professor Jonathan Gruber before the Comm. on Oversight and Gov't Reform, U.S. House of Representatives 1 (Dec. 9, 2014), http://oversight.house.gov/wp-content/uploads/2014/12/Gruber-Statement-12-9-ObamaCare1.pdf (explaining that he "ran microsimulation models").[22] Moreover, the only citation for this suggestion is *one* statement Gruber made in 2012 long after the law was enacted—a statement that he has made clear was taken out of context and does not, properly understood, mean what Petitioners claim it means, *id.* at 1-2. As he has explained, he has a "long-standing and well-documented belief that [the ACA] . must include mechanisms for residents in all states to obtain tax credits" and, in fact, his "microsimulation model for the ACA expressly modeled for the citizens of *all* states to be eligible for tax credits, whether served directly by a state exchange or by a federal exchange." *Id.* at 2. Incredibly, Petitioners do not cite (or even name) any of the "others" who purportedly understood the subsidies provision to work this way, let alone any members of Congress who actually passed the law. That Petitioners rely so heavily on Gruber's statement as evidence in support of their

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[22] Tellingly, the newspaper article that Petitioners cite for the proposition that Gruber "helped congressional staff 'draft the specifics of the legislation'" (Pet'rs Br. 4) explained that his "assignment" to help members of Congress draft the legislation "primarily involved asking his graduate student researchers to tweak his model's software code." Catherine Rampell, *Mr. Health Care Mandate*, N.Y. Times, Mar. 29, 2012, at B1.

claim only underscores their inability to find any support in the *actual* legislative record.[23]

In fact, the ACA's legislative history makes clear that Congress has never sought to make the availability of tax credits conditional on States establishing their own Exchanges. Congress has three times amended the section at issue here and each time the legislation, and the accompanying budgetary predictions, reflected the understanding that the subsidies would be available on all Exchanges.[24] Because these amendments were to the specific provision at issue in this appeal, this history is not subsequent legislative history and is directly relevant to the question before this Court. *See, e.g., United States v. Bd. of Comm'rs of Sheffield, Ala.*, 435 U.S. 110, 135 n.25 (1978).

Most significantly, Congress amended the provision to change the way subsidies (in all States) are calculated *after* the IRS had proposed the rule that allowed subsidies for customers using federally-facilitated Exchanges and after HHS had proposed a parallel rule on the obligations of Exchanges, 76 Fed. Reg. 41,866 (July 15, 2011). *See* Pub. L. No. 112-56, § 401, 125 Stat. 711, 734 (2011). As *amici* know from their own experience, members of Congress were well aware of these regulations. Yet the report on the bill amending the subsidy calculation provisions—just like the many statements by members of Congress

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[23] It is worth noting that Petitioners abandoned one of the purportedly key pieces of legislative history evidence on which they relied before the court below, *i.e.*, the informal exchange between Senator Baucus and Senator Ensign. Br. for Appellants at 45, *King v. Sebelius*, 759 F.3d 358 (4th Cir. 2014), 2014 WL 882811, at *45.

[24] For a full discussion of these amendments, see Families USA *Amicus* Brief at 24-26, *Halbig v. Sebelius*, No. 13-cv-00623-PLF (D.D.C. Nov. 12, 2013), ECF No. 48-1.

preceding the ACA's passage—assumed that the credits would be available to all individuals who satisfied the income criteria. The report stated without qualification that the "premium assistance credit is available for individuals . with household incomes between 100 and 400 percent of the Federal poverty level."[25] More specifically, the report referenced estimates of the cost of the subsidies by the Congressional Budget Office and the Joint Committee on Taxation that reflected—and quantified—the shared understanding that the ACA prescribed premium assistance on all Exchanges in all States.[26]

In the absence of any specific statements that the tax credits were a tool to encourage state action, Petitioners infer that this must be the case because Congress had no other way to induce the States to participate. *See, e.g.*, Pet'rs Br. 14 ("limiting subsidies to state-established Exchanges was the best, and perhaps the only, way Congress could accomplish *both* nationwide subsidies *and* state-run Exchanges").[27] But in fact the principal mechanism applied here—

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[25] H.R. Rep. No. 112-254, at 3 (2011), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt254/pdf/CRPT-112hrpt254.pdf.

[26] *Id.* at 12.

[27] Petitioners also point to other "carrots" and "sticks" they say Congress used to "induce states to establish Exchanges voluntarily." Pet'rs Br. 2. But none of these inducements to establish Exchanges are conditional grants, and the conditional grant provisions that are in the ACA were included for purposes entirely unrelated to the Exchanges. For example, Petitioners point to the prohibition on tightening of Medicaid eligibility standards, which is part of the Medicaid expansion provisions (*id.*), but, as the Government explains, that measure was a temporary one that had nothing to do with encouraging the States to set up their own Exchanges, Resp'ts Br. 29.

giving States the option of establishing a program compliant with federally prescribed criteria, but providing for federal operation of the program in any State that failed to do so on its own—is often used by Congress. *See, e.g.*, *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981). States frequently (in fact, usually) opt to operate such programs rather than cede control to the federal government because maintaining control leaves the States with the discretion to tailor federally prescribed programs to local needs.

Indeed, in making the decision whether to establish state-run Exchanges, some governors acknowledged that they preferred for their States to set up their own Exchanges for these very reasons. For example, "Republican Gov. Brian Sandoval told the Las Vegas Review-Journal . . . that Nevada's decision to run its own exchange—*and take as much control of the insurance system as possible under the law*—was the right one."[28] Likewise, Kentucky Governor Steve Beshear stated that "[a]nytime a large scale program of this nature kicks off there are concerns along the way, but we feel that *our state-centered process* allowed us to address those."[29] And proponents of set-

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[28] Vaughn Hillyard, *Politics Wasn't Only Reason Why Some GOP-Led States Didn't Set Up Own Exchanges*, NBC News (Dec. 4, 2013), http://www.nbcnews.com/politics/first-read/politics-wasnt-only-reason-why-some-gop-led-states-didnt-v21755208 (emphasis added).

[29] *Id.* (emphasis added). In the same vein, the Republican co-sponsor of the legislation creating Colorado's Exchange explained, "[T]o me, and to the business community, creating . . a state exchange close to home in a pro-market manner was the best solution for us." Eric Whitney, *Despite Setbacks, Bipartisan Support Remains For Colorado Exchange*, npr.org (Mar. 18, 2014), http://www.npr.org/blogs/health/2014/03/18/290092059/

ting up state Exchanges emphasized this factor. For example, one opinion piece noted that "if states do not move forward on their own, the federal government will. Because of this fact alone, states should move forward with creating their own exchanges. It's better for states to exert some control over the structure of their exchanges than to abdicate control to Washington."[30] Thus, the loss of regulatory control was well established as a highly potent incentive for States to set up their own Exchanges, contrary to Petitioners' assertions that the threat of nullifying premium assistance tax credits and subsidies was "the best, and perhaps the only, way" to induce States to set up their own Exchanges, *see* Pet'rs Br. 14. In short, Petitioners' conjecture that "[a]bsent such a financial incentive, it was unlikely that all states" would set up their own Exchanges (*id.*) is both illogical and totally lacking in record support.

Thus, Petitioners offer nothing to refute what the record shows and what *amici* know from their own experience: the purpose of the tax credits was not to encourage States to set up their own Exchanges. Indeed, making the tax credits conditional on state establishment of the Exchanges would have empowered hostile state officials to undermine the ACA's core purpose. It defies commonsense for Petitioners to suggest that *amici* and other architects of the ACA sought to encourage such a perverse result.

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despite-setbacks-bipartisan-support-remains-for-colorado-exchange.

[30] David Merritt, *Why States Should Move Forward With Health Insurance Exchanges*, Daily Caller (Mar. 13, 2012), dailycaller.com/2012/03/13/why-states-should-move-forward-with-health-care-exchanges/#ixzz2mjT2jiZe.

This is no minor point—by blocking qualified individuals from receiving premium tax subsidies, as Petitioners' version of the ACA would allow, state opponents of the ACA could prevent the law from delivering immensely valuable benefits to large numbers of low- and moderate-income individuals and families. Moreover, it would render the Exchanges inoperable, even for participants not entitled to tax credits or subsidies, and thus raise premiums and curtail insurance offerings across the entire market for individual insurance. Eliminating premium assistance would undermine other aspects of the law crucial to achieving health care reform, including the individual mandate and the insurance reforms ensuring coverage of pre-existing conditions, preventing arbitrary terminations, and addressing other well-known insurance industry abuses.

It bears emphasis that the tax credits are not merely, as Petitioners suggest, related in some nonspecific manner to the "amorphous 'purpose'" of "making subsidies universally available so that health coverage will be 'affordable.'" Pet'rs Br. 33. Rather, the credits are indispensable to effectuating other specific components of the statutory scheme (including the provisions just discussed) that are themselves indispensable to the statute's fundamental goal of making health care affordable for all Americans. For the interdependent scheme Congress designed to work properly, those tax credits must be available to all Americans, regardless of where they live.

II. STATE GOVERNMENT OFFICIALS NEVER UNDERSTOOD THE TAX CREDITS TO BE LIMITED TO STATE-RUN EXCHANGES

Just as Congress never told the States that their citizens would lose access to the tax credits if they did not set up their own Exchanges, members of state

governments never understood the statute to operate in that way based on their review of the statute and the legislative record. *Amici* members of state legislatures were involved in the debates in their States over whether to set up Exchanges and thus know from their own experience that, even before the IRS promulgated its regulation confirming that tax credits would be available to purchasers on both state-run and federally facilitated Exchanges, no one in the States understood access to the tax credits to turn on the establishment of state-run Exchanges. Indeed, the States considered many factors in deciding whether to set up Exchanges in the period immediately following the law's enactment, but the possibility that the failure to set up a state-run Exchange would preclude that State's citizens from enjoying the tax credits and subsidies was never one of them.

For example, California, in response to a query from HHS about "[w]hat factors [the States would] consider in determining whether they will elect to offer an Exchange by January 1, 2014," 75 Fed. Reg. 45,584, 45,586 (Aug. 3, 2010), noted that "the primary consideration for states is whether policy makers view the Exchange as an effective tool for improving access, quality, and affordability of health insurance coverage and view state administration of the Exchange as the best way to achieve these goals."[31] It did not mention the tax credits. In response to the same prompt, Texas noted that it would consider "cost containment, cost effectiveness, maintaining state flexibility, and how a state-run Exchange vs. a federally-run Exchange would interact with the Tex-

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[31] Cal. HHS, *Public Comments to HHS on the Planning and Establishment of State-Level Exchanges* 2 (Oct. 4, 2010), *available at* https://www.statereforum.org/sites/default/files/california-1.pdf.

as insurance market and Texas' existing health coverage programs, including Medicaid and CHIP."[32] It, too, failed to mention the tax credits. Strikingly, Ohio, in a working group report, listed five pros and four cons to establishing a State Exchange, but the availability (or not) of the tax credits did not appear on either list.[33] Indeed, so far as *amici* are aware, no State *ever* suggested that the lack of subsidies on a federally-facilitated Exchange was a factor in its decision.[34] Surely, if the States had recognized that

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[32] Tex. Dep't of Ins. & HHS Comm'n, *Public Comments to HHS on the Planning and Establishment of State-Level Exchanges* 1 (Oct. 4, 2010), *available at* https://www.statereforum.org/sites/default/files/texas.pdf.

[33] Ohio Health Care Coverage & Quality Council, Report of Health Benefits Exchange Task Force, *available at* https://www.statereforum.org/sites/default/files/hbe_pros_cons_10_2_10_-_final_2.pdf (listing pros and cons of Ohio setting up its own Exchange).

[34] *Amici*'s conclusion is consistent with research performed as part of a comprehensive Georgetown University Health Policy Institute study of state decisions implementing ACA Exchange provisions. As summarized by a co-author of this study, States were motivated by a mix of policy considerations, such as flexibility and control, and "strategic" calculations by ACA opponents, not the availability of tax credits. *See* Christine Monahan, Halbig v. Sebelius *and State Motivations To Opt for Federally Run Exchanges*, CHIRblog (Feb. 11, 2014), http://chirblog.org/halbig-v-sebelius-and-state-motivations-to-opt-for-federally-run-exchanges/. Monahan notes that two *amicus* briefs filed in parallel litigation on behalf of States controlled by ACA opponents "imply [without actually asserting] that these states decided not to pursue state-based exchanges because they did not want premium tax credits to be available in their states," but the Georgetown researchers' extensive review of *contemporaneous* "official public statements," press accounts, and interviews shows this *post hoc* claim seeking to block premium assistance for their residents "was, at best, little more than an afterthought." *Id.*

their citizens would lose access to the premium tax credits and subsidies if they failed to set up their own Exchanges, that would have been at least one factor, if not a key factor, in their decisionmaking.[35]

The National Governors Association ("NGA"), too, identified numerous issues associated with implementing the Exchanges, but (again) the prospect that a State's citizens might be denied the tax credits if the State failed to set up its own Exchange was never one of them. For example, within days of the ACA's passage, the NGA circulated an eight page, single-spaced document identifying key implementation issues for its members.[36] Nowhere in this lengthy document was there any suggestion that the tax credits would not be available if States did not set up their own Exchanges. Similarly, on September 16, 2011, the NGA published an Issue Brief on "State Perspectives on Insurance Exchanges."[37] It, too, enumerated state concerns regarding implementation of the Ex-

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[35] Tellingly, when State ACA opponents were filing their brief in the Supreme Court objecting to ACA's Medicaid expansion provisions, they did not think the tax credit provisions were intended to pressure them into setting up their own Exchanges. In fact, they repeatedly *contrasted* the Medicaid expansion, which they challenged as coercive, with the Exchange provisions, which they viewed as non-coercive. *See* Brief of State Petitioners on Medicaid, *Florida v. U.S. Dep't of Health and Human Servs.*, No. 11-400 (11th Cir. Jan. 10, 2012), 2012 WL 105551, at *12; *see id.* at *22, 25, 51.

[36] *See* Nat'l Governors Ass'n, *Implementation Timeline for Federal Health Reform Legislation* (2010), *available at* http://www.nga.org/files/live/sites/NGA/files/pdf/1003HEALTHSUMMITIMPLEMENTATIONTIMELINE.PDF.

[37] *See* Nat'l Governors Ass'n, *State Perspectives on Insurance Exchanges: Implementing Health Reform In An Uncertain Environment* (2011), *available at* http://www.nga.org/files/live/sites/NGA/files/pdf/1109NGAEXCHANGESSUMMARY.PDF.

change provisions, and it, too, did nothing to indicate that the NGA had even contemplated the possibility that the tax credits would not be available to individuals who purchased insurance on federally-facilitated Exchanges. Given the important role that the tax credits were to play in making health insurance affordable—again, the core purpose of the ACA—it makes no sense to think that issue would have been omitted as the NGA helped States decide whether and how they would participate in implementing the statute.

Two of Petitioners' *amici* suggest that the States did understand that the availability of tax credits turned on whether an Exchange was State or federally-facilitated, pointing primarily to a handful of statements made during and after 2012 that they claim made States aware that the credits would not be available if they did not set up their own Exchanges. Missouri Liberty Project et al. *Amici* Br. 13-21; *see also* Galen Institute et al. *Amici* Br. 13-14.

The problem with this argument is that the relevant time period for determining what States understood based on the text of the law and the actual legislative record is the period immediately following the law's enactment, that is, before the individuals behind the current litigation published their argument that the credit would not be available on federally-facilitated Exchanges,[38] and before one of them executed a nationwide campaign to attempt to persuade sympathetic state officials to, as he put it, "'block[] the state exchanges'" in order to force Congress to "'get rid of . this very bad law,'" Steve Mistler, *Out-*

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[38] Jonathan H. Adler & Michael F. Cannon, *Another ObamaCare Glitch*, Wall St. J., Nov. 16, 2011, http://www.wsj.com/articles/SB10001424052970203687504577006322431330662.

spoken Critic of Obamacare Helped To Turn LePage Against State Exchange, Portland Press Herald, Nov. 23, 2014, http://www.pressherald.com/2014/11/23/out spoken-critic-of-obamacare-helped-to-turn-lepage-against-state-exchange/ (quoting Michael F. Cannon) (cited in Missouri Liberty Project et al. *Amici* Br. 17). By that point, it is unsurprising that some individuals might claim that the tax credits would not be available on federally-facilitated Exchanges, notwithstanding the plain text of the law and the universal understanding at the time it was enacted.

But Petitioners' *amici* cite *no* evidence from the period immediately following the law's enactment that suggests that States believed that the availability of tax credits turned on whether they set up their own Exchange.[39] To the contrary, the only pre-2012 evidence *amici* cite confirms that *other* factors—such as lack of regulatory control—caused States not to set up their own Exchanges. *See* Missouri Liberty Project et al. *Amici* Br. 13 (legislation to establish a State Exchange in Missouri "stalled [because opposing Senators] believed that the bill gave the federal government too much control over the exchange"). *Amici* provide no evidence—as opposed to conjecture—that the States understood the premium tax assistance to be limited to state-run Exchanges based on the text of the law and the legislative record.

Petitioners' *amici* do provide "evidence" that some individuals questioned the availability of tax credits on federally-facilitated Exchanges *after* 2011, but

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[39] Six states submitted an *amici curiae* brief supporting Petitioners that baldly asserts that "the States were well aware" that tax credits were available only on state-run exchanges, Oklahoma et al. *Amici* Br. 15, but strikingly, the brief cites no evidence—*none*—in support of that assertion.

none of this putative "evidence" detracts from the contemporaneous, universal understanding shared by officials in the States in the period immediately after the law's enactment that the provisions at issue in this case prescribed tax credits and subsidies to make insurance affordable on all Exchanges in all States, regardless of who operated them.[40] Moreover, almost

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[40] Moreover, there is significant evidence from this period that confirms that States continued to understand that tax credits would be available in States with federally-facilitated Exchanges and made their decisions about whether to set up Exchanges based on that understanding. *See* Virginia et al. *Amici* Br. 15-27; *see also* Marilyn Ralat-Albernas, R.N., et al. *Amici* Br. 29-30. Indeed, even after the law's opponents put forward their interpretation in late 2011, some prominent leaders in States with federally-facilitated Exchanges remained unpersuaded. Wisconsin Governor Scott Walker, for example, "spent nearly two years looking at" whether to set up a state Exchange and saw "no real substantive difference" in the ACA between a state-run Exchange and the federally-facilitated option which he and his legislature chose. *WSJ Live Presents: Gov. Scott Walker Interviewed*, Wall St. J. Video (Mar. 27, 2013), http://www.wsj.com/video/wsj-live-presents-gov-scott-walker-interviewed/1BC163BF-68C2-4351-9DFF-CCF03AE5FC6E.html (relevant remarks at 1:52, 2:37-44). Significantly, Governor Walker's conclusion was essential to his solution to the problem of how to increase insurance coverage in Wisconsin given his decision to reject the expansion of Medicaid. *See* Erin Toner, *Scott Walker's Medicaid Maneuver*, Kaiser Health News (Nov. 19, 2013), http://kaiserhealthnews.org/news/wisconsin-governor-scott-walker-embraces-parts-of-obamacare/ (explaining that Wisconsin would shift 83,000 persons formerly covered by the State's Medicaid program to subsidized coverage via the State's federally-facilitated Exchange). Governor Walker publicly specified that this solution would work because "the Exchanges under the Affordable Care Act provide a subsidy to make the health care Exchange affordable." Governor Walker Addresses WMC Business Day in Madison, WI, Wisconsin Eye (Feb. 13, 2013), http://www.wiseye.org/videoplayer/vp.html?sid=9595 (relevant remarks at 22:00).

none of this "evidence" actually suggests, let alone proves, that state legislators and other state officials believed that tax credits would not be available on federally-facilitated Exchanges; rather, *amici* largely point to statements made in op-eds and by advocates without even trying to tie those statements to actual deliberations by State officials.[41] In short, Petitioners' *amici* point to nothing that undermines *amici* state legislators' belief that the States never understood the tax credits to be limited to state-run Exchanges based on the text of the law and the legislative record.

Indeed, if *amici* state legislators thought there was a real possibility that their constituents would lose access to these valuable tax credits unless their States established their own Exchanges, they would have vigorously advocated for state-run Exchanges citing this potential consequence. But this was not part of the debate because everyone at the time understood that the tax credits were an essential component of the ACA that were to be available to all Americans regardless of whether they purchased insurance on a state-run or federally-facilitated Exchange.

* * *

In conclusion, as *amici* know from their own experience, Petitioners' argument that the tax credits were intended to induce States to set up their own Exchanges makes no sense in light of the text, histo-

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[41] For example, Petitioners' *amici* note that Maine's governor elected to have the federal government operate that State's Exchange (Missouri Liberty Project et al. *Amici* Br. 17), but Maine has joined a brief supporting the Government in this case. *See* Virginia et al. *Amici* Br.

ry, and purpose of the statute, all of which make clear that Congress never sent—and state officials never received—any message indicating that States needed to set up their own Exchanges if they wanted their citizens to have access to the tax credits and subsidies. Indeed, Congress never sent any such message for the simple reason that it did not intend the statute to operate in the way Petitioners argue. Rather, the tax credits and subsidies were supposed to be available to all Americans to help realize the statute's goal of making insurance affordable for all Americans.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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January 28, 2015 * Counsel of Record

APPENDIX

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APPENDIX A:

LIST OF CONGRESSIONAL *AMICI**

Becerra, Xavier
Representative of California

Clyburn, James E.
Representative of South Carolina

Conyers, John, Jr.
Representative of Michigan

Crowley, Joseph
Representative of New York

Durbin, Dick
Senator of Illinois

Harkin, Tom
Former Senator of Iowa

Hoyer, Steny
Representative of Maryland

Levin, Sander M.
Representative of Michigan

Miller, George
Former Representative of California

Murray, Patty
Senator of Washington

Pallone, Frank
Representative of New Jersey

Pelosi, Nancy
Representative of California

LIST OF CONGRESSIONAL *AMICI*–cont'd.

Reid, Harry
Senator of Nevada

Schumer, Charles E.
Senator of New York

Scott, Bobby
Representative of Virginia

Waxman, Henry
Former Representative of California

Wyden, Ron
Senator of Oregon

* *Amici* who no longer serve in Congress join solely in their individual capacities as former members of Congress.

APPENDIX B:

LIST OF STATE LEGISLATOR *AMICI**

Ajello, Edith
Representative of Rhode Island

Albis, James
Representative of Connecticut

Alexander, Kelly
Representative of North Carolina

Antonio, Nickie
Representative of Ohio

Barrett, Dick
Senator of Montana

Beavers, Roberta
Representative of Maine

Bennett, David
Representative of Rhode Island

Bolkcom, Joe
Senator of Iowa

Briggs, Sheryl
Former Representative of Maine

Briscoe, Joel
Representative of Utah

Bronson, Harry
Assemblymember of New York

Bullard, Dwight
Senator of Florida

Cafaro, Capri
Senator of Ohio

LIST OF STATE LEGISLATOR *AMICI* – cont'd.

Carey, Michael
Former Representative of Maine

Chase, Cynthia
Representative of New Hampshire

Chenette, Justin
Representative of Maine

Cody, Eileen
Representative of Washington

Coleman, Garnet
Representative of Texas

Cooper, Janice
Representative of Maine

Cunningham, Carla
Representative of North Carolina

Daley, Mary Jo
Representative of Pennsylvania

Daughtry, Matthea
Representative of Maine

Dicks, Steph`
Assemblymember of Pennsylvania

Dorney, Ann
Representative of Maine

Fahy, Patricia
Assemblymember of New York

Falk, Andrew
Former Representative of Minnesota

Farnsworth, Richard
Representative of Maine

LIST OF STATE LEGISLATOR *AMICI* – cont'd.

Ferri, Frank
Former Representative of Rhode Island

Fisher, Susan
Representative of North Carolina

Fitzgibbon, Joe
Representative of Washington

Fludd, Virgil
Representative of Georgia

Fraser, Karen
Senator of Washington

Gardner, Pat
Representative of Georgia

Gattine, Drew
Representative of Maine

Gibson, Audrey
Representative of Florida

Gilbert, Paul
Representative of Maine

Gill, Rosa
Representative of North Carolina

Glassheim, Eliot
Representative of North Dakota

Glazier, Rick
Representative of North Carolina

Goode, Adam
Representative of Maine

Gottfried, Richard N.
Chair, Assembly of New York

LIST OF STATE LEGISLATOR *AMICI* – cont'd.

Gratwick, Geoff
Senator of Maine

Hamann, Scott
Representative of Maine

Harlow, Denise
Representative of Maine

Harrison, Pricey
Representative of North Carolina

Hatch, Jack
Senator of Iowa

Hunt, Sam
Representative of Washington

Insko, Verla
Representative of North Carolina

Johnson, Burt
Senator of Michigan

Johnson, Connie
Former Senator of Oklahoma

Jones, Brian
Former Representative of Maine

Jones, Mia L.
Representative of Florida

Karrick, David
Representative of New Hampshire

Kaufmann, Christine
Senator of Montana

Keiser, Karen
Senator of Washington

LIST OF STATE LEGISLATOR *AMICI* – cont'd.

King, Phylis
Representative of Idaho

Kline, Adam
Former Senator of Washington

Kloucek, Frank
Former Representative of South Dakota

Kohl-Welles, Jeanne
Senator of Washington

Kruger, Chuck
Representative of Maine

Kumiega, Walter
Representative of Maine

Kusiak, Karen
Former Representative of Maine

Lemar, Roland
Representative of Connecticut

Lesser, Matthew
Representative of Connecticut

Lewis, Jason
Senator of Massachusetts

Liebling, Tina
Representative of Minnesota

Liias, Marko
Senator of Washington

Longstaff, Thomas
Representative of Maine

Luedtke, Eric
Delegate of Maryland

LIST OF STATE LEGISLATOR *AMICI* – cont'd.

MacDonald, Bruce
Former Representative of Maine

Madaleno, Jr., Richard
Senator of Maryland

Markey, Margaret
Assemblywoman of New York

Marzian, Mary Lou
Representative of Kentucky

Mason, Andrew
Former Representative of Maine

Mastraccio, Anne-Marie
Representative of Maine

Mathern, Tim
Senator of North Dakota

Mcgowan, Paul
Former Representative of Maine

McLean, Andrew
Representative of Maine

McNamar, Jay
Representative of Minnesota

McSorley, Cisco
Senator of New Mexico

Molchany, Erin C.
Representative of Pennsylvania

Moody, Marcia
Representative of New Hampshire

Moonen, Matthew
Representative of Maine

LIST OF STATE LEGISLATOR *AMICI* – cont'd.

Morrison, Terry
Representative of Maine

Mundy, Phyllis
Former Representative of Pennsylvania

Nelson, Mary Pennell
Former Representative of Maine

Newman, Stacey
Representative of Missouri

Noon, Bill
Representative of Maine

Nordquist, Jeremy
Senator of Nebraska

O'Brien, Michael
Representative of Pennsylvania

Orrock, Nan
Senator of Georgia

Ortiz, Felix
Assembly Member of New York

Ortiz y Pino, Gerald
Senator of New Mexico

Parker, Cherelle L.
Representative of Pennsylvania

Patterson, Daniel
Former Representative of Arizona

Paulin, Amy
Assemblymember of New York

Phillips, Mike
Senator of Montana

LIST OF STATE LEGISLATOR *AMICI* – cont'd.

Porter, Marjorie
Representative of New Hampshire

Pringle, Jane
Former Representative of Maine

Richardson, Bobbie
Representative of North Carolina

Ringo, Shirley
Former Representative of Idaho

Rivera, Gustavo
Senator of New York

Rochelo, Megan
Former Representative of Maine

Rosenbaum, Diane
Senator of Oregon

Rosenwald, Cindy
Representative of New Hampshire

Rusche, John
Representative of Idaho

Ryan, Kevin
Representative of Connecticut

Rykerson, Deane
Representative of Maine

Ryu, Cindy
Representative of Washington

Sanborn, Linda
Representative of Maine

Saucier, Robert
Representative of Maine

LIST OF STATE LEGISLATOR *AMICI* – cont'd.

Schlossberg, Michael
Representative of Pennsylvania

Schneck, John
Representative of Maine

Sells, Mike
Representative of Washington

Sepulveda, Luis
Assemblyman of New York

Sheran, Kathleen
Senator of Minnesota

Sims, Brian
Representative of Pennsylvania

Skindell, Michael
Senator of Ohio

Slocum, Linda
Representative of Minnesota

Stanford, Derek
Representative of Washington

Talabi, Alberta
Representative of Michigan

Tavares, Charleta B.
Senator of Ohio

Till, George
Representative of Vermont

Tipping-Spitz, Ryan
Representative of Maine

Townsend, Charles
Representative of New Hampshire

LIST OF STATE LEGISLATOR *AMICI* – cont'd.

Treat, Sharon
Former Representative of Maine

Vuckovich, Gene
Senator of Montana

Wanzenried, David E.
Former Senator of Montana

Ward, JoAnn
Representative of Minnesota

Witt, Brad
Representative of Oregon

Yantachka, Michael
Representative of Vermont

* *Amici* who no longer serve in a state legislature join solely in their individual capacities as former state legislators.